Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

METROPOLITAN EDUCATIONAL ENTERPRISES, INC.
AND LEONARD BIEBER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondents concede (Br. in opp. 7), as they must, that the court of appeals' ruling in this case conflicts with rulings by other courts of appeals regarding the method of determining whether an employer "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" (42 U.S.C. 2000e(b)), and is therefore subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In our certiorari petition, we demonstrate that, while the Eighth Circuit agrees with the approach taken by the court below (see *EEOC* v. *Garden & Assocs., Ltd.*,

956 F.2d 842 (8th Cir. 1992)) and counts only employees who report to work or are on paid leave on each day, the First and Fifth Circuits agree with the interpretation of the Equal Employment Opportunity Commission (EEOC) and count employees who are on the employer's payroll on each day. *Vera-Lozano* v. *International Broadcasting*, 50 F.3d 67 (1st Cir. 1995); *Thurber* v. *Jack Reilly's, Inc.*, 717 F.2d 633 (1st Cir. 1983), cert. denied, 466 U.S. 904 (1984); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974 (5th Cir. 1980) overruled on other grounds, *Larkin* v. *Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1568-1569 (11th Cir. 1988), vacated, 493 U.S. 929 (1989).

Respondents contend that the Court should nonetheless decline to resolve the conflict. They attempt to downplay the extent of the conflict, noting that the First Circuit did not cite or distinguish the precedent upon which the court below relied and suggesting that the relevant reasoning in the Fifth Circuit opinion was not necessary to the holding of that case. The fact that the First Circuit disregarded erroneous and contrary precedent of other circuits does nothing to undermine the fact that its ruling is directly contrary to the ruling of the court below and was issued just four months prior to it. Moreover, despite respondents' suggestion that the analysis of the Fifth Circuit was dictum, some lower courts have specifically cited and followed that case's reasoning on this issue. See, *e.g.*, *Lynn* v. *JER Corp.*, 573 F. Supp. 17 (M.D. Tenn. 1983); *Hornick* v. *Borough of Duryea*, 507 F. Supp. 1091 (M.D. Penn. 1980). It is clear that certain employees who are afforded Title VII's protection against employment discrimination in the First and Fifth Circuits are excluded from such protection within the Seventh and Eighth

Circuits. The proper test for determining Title VII coverage is an important question meriting resolution by this Court.

2. Respondents' assertion (Br. in Opp. 11-14) that the court below correctly ruled that the statutory language is unambiguous, and thus properly declined to give deference to the EEOC's interpretation, fails to account for the fact that Congress recently incorporated the same statutory language in the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. 2601 *et seq.*, and that the accompanying Senate Report expressly approves the EEOC's interpretation. S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993). The careful explanation of the EEOC's interpretation in the FMLA Senate Report demonstrates, at a minimum, that the statutory language is susceptible to more than one construction and that the EEOC's interpretation is a reasonable one, thus undermining respondents' only textual argument and the sole rationale of the prior Seventh Circuit precedent. *Zimmerman* v. *North American Signal Co.*, 704 F.2d 347 (7th Cir. 1983).

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For the foregoing reasons and those set forth in the petition, the petition should be granted and the judgment of the court of appeals reversed.

Respectfully submitted.

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